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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ROBERT MARTIN et al., Plaintiffs and Appellants, v. CALIFORNIA PHYSICIANS' SERVICE et al., Defendants and Respondents.	A145374 (San Francisco County Super. Ct. No. CGC-12-521539)

In this class action case, plaintiffs Robert Martin and Deborah Goodwin, on behalf of themselves and all others similarly situated, sued defendants California Physicians' Service, dba Blue Shield of California (BSC), and Blue Shield of California Life & Health Insurance Company (BSL) (collectively, Blue Shield). Plaintiffs alleged Blue Shield violated certain California statues regulating the closure of health plans to new membership by pushing older, sicker consumers into lower-benefit, higher-deductible coverage. The trial court denied plaintiffs' motion to certify the lawsuit as a class action, concluding, in part, that individualized issues predominated over common ones. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Background and Plaintiffs' Allegations

BSC is a health care service plan provider regulated by the Department of Managed Health Care. Martin's health care service plan sold by BSC is governed by the Health and Safety Code. BSL provides health and other types of insurance, and is

regulated by the Department of Insurance. Goodwin purchased a health insurance policy from BSL, and her claims are brought under the Insurance Code.

On June 18, 2013, plaintiffs filed their third amended class action complaint (TAC). The TAC contains claims for (1) unlawful violations of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) (UCL), (2) unfair violations of the UCL, and (3) declaratory relief. In their lawsuit, plaintiffs challenged Blue Shield's practices in closing certain health plans, claiming the practices resulted in higher healthcare expenditures (i.e., premiums and/or out-of-pocket expenses) due to the improper closures of the plans and the improper methodology used to calculate subsequent rate changes.

Plaintiffs alleged the impact of the plan closures on consumers created a "death spiral" scenario, which occurs when an insurance carrier ceases to offer plans to new applicants.[1] Consumers in the closed plans who have preexisting medical conditions are confined to their plans because they cannot seek other comparable coverage due to their preexisting conditions. Such consumers are either unable to obtain alternative health coverage, or may be given the option to transfer to health plans that offer lesser benefits and higher deductibles. Rates for any given member in a particular health plan product are calculated based on a number of factors, including an actuarial analysis of the health risks of the members in the plan—known as the "risk pool." (See Off. of Sen. Floor Analysis, analysis of Assem. Bill No. 1743 (1993–1994 Reg. Sess.) Aug. 31, 1993.) Closures have the potential to lead to a rate spiral over time if healthier members leave the risk pool while members with a greater need for health care remain. Since health plan rates are based on the health care utilization of consumers enrolled in a plan, rates in the closed plans "spiral" up over time until enrollees are eventually priced out of coverage, hence the term "death spiral."

By their complaint, plaintiffs sought equitable relief in the form of restitution and disgorgement of all monies allegedly illegally extracted from class members by Blue Shield's failure to offer comparable coverage and/or pool plans in a manner consistent

[1] This practice is also referred to as closing a "block of business."

with relevant statutes. They also requested injunctive relief to prevent Blue Shield from continuing to harm sick and older consumers, as well declaratory relief confirming that Blue Shield had violated class members' rights to be treated as the law requires.[2]

To protect against rate spirals, the Legislature enacted the Closure Statutes.[3] These statutes require carriers to notify state regulators of plan closures and either (1) implement a pooling plan to afford limited rate protection to members of the closed plan, or (2) let members transfer into "comparable" open plans without medical underwriting, thus allowing those with preexisting conditions to find new plans. (Health & Saf. Code, § 1367.15, subd. (c); Ins. Code, § 10176.10, subd. (d).)[4] In other words, carriers are required either to temper rate increases by pooling closed plans with "appropriate" open plans, or to let members move to other comparable open plans (even

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[2] Plaintiffs estimated there were at least 300,000 and up to 450,000 potential members of the class.

[3] Plaintiffs also alleged that Blue Shield violated statutes that allow plan members an annual opportunity to transfer to alternate plans, which the parties and the trial court referred to as the "Transfer Statutes." (See Health & Saf. Code, § 1389.5; Ins. Code, § 10119.1.) These statutes were repealed effective January 1, 2014. The trial court denied certification of a class under the Transfer Statues. Plaintiffs do not challenge this ruling on appeal.

[4] Health and Safety Code section 1367.15, subdivision (c) provides: "No block of business shall be closed by a health care service plan unless (1) the plan permits an enrollee to receive health care services from any block of business that is not closed and that provides comparable benefits, services, and terms, with no additional underwriting requirement, or (2) the plan pools the experience of the closed block of business with all appropriate blocks of business that are not closed for the purpose of determining the premium rate of any plan contract within the closed block, with no rate penalty or surcharge beyond that which reflects the experience of the combined pool."

Insurance Code section 10176.10, subdivision (d) provides, in part: "No insurer providing disability insurance covering hospital, medical, or surgical expenses shall close a policy form or group certificate without notification to the commissioner. That notification shall include a plan to permit an insured to move to any open block, providing comparable benefits with no additional underwriting requirement or, alternatively, the insurer shall be required to pool the closed block's experience with all appropriate open forms for purposes of renewal rate determination, with no rate penalty or surcharge, beyond that which reflects the experience of the combined pool."

though the members may have preexisting conditions that otherwise would have disqualified them). Either option—tempering rates or letting members transfer out—is sufficient under the law.

When a health insurer chooses the pooling option, instead of setting rates for the closed plan based only on actuarial information about that plan's members, it pools the actuarial information with that of other similar plans and determines rates based on the combined pool. While this practice may result in reducing rates for members of plans who have a higher risk, it simultaneously can increase rates for other pooled members.

There are three alleged rounds of plan closures at issue in this case, occurring on March 2, 2010, March 23, 2010, and July 2, 2012. On March 2, 2010, Blue Shield closed eight plans to new membership. Martin was a member of one of those closed plans, the Shield Spectrum PPO 2000. Blue Shield began offering a PPO 5500 plan and two new government-required HMO plans. It offered Martin the option to transfer into a comparable plan without medical underwriting. Martin exercised that option and left his closed plan for the newly opened PPO 5500 plan. At the same time, BSL began offering 23 PPO health plans for new enrollment. BSC did not pool its closed plans with the open BSL plans. Instead, BSC pooled the closed plans with the PPO 5500 and its three open HMO health plans when it calculated premium rate increases in January 2011 and March 2012. Plaintiffs allege BSC used a "similarly inappropriate pooling methodology" in computing two later rate increases.

On March 23, 2010, BSL grandfathered many of its policies in response to the enactment of the federal Patient Protection and Affordable Care Act (ACA) (Pub.L. No. 111-148 (Mar. 23, 2010) 124 Stat. 119). Goodwin was a member of a grandfathered BSL policy, the Shield Savings 1800/3600 PPO, until December 2013 when, allegedly in response to improper pooling, she canceled her coverage in favor of Medicare. Plaintiffs allege BSL failed to comply with the Closure Statutes with respect to the grandfathered policies.

In July 2012, BSL closed 23 other policies to new membership. Neither named plaintiff had ever been a member of one of these policies.

II. Motion for Class Certification

On September 9, 2013, plaintiffs filed a motion for class certification. In their motion, they asserted their lawsuit satisfied all the criteria for class certification. With respect to whether common questions of law and fact predominated over individual issues, they asserted, among other things, that "[w]hether Blue Shield's pooling methodologies used for calculating rates for the closed blocks of business was improper" was "subject to common proof."

On January 16, 2014, Blue Shield filed a motion for judgment on the pleadings on the ground that changes in the law had rendered moot plaintiffs' cause of action for declaratory relief and prayer for injunctive relief. The motion was based on the March 2010 enactment of the ACA. Specifically, Blue Shield argued that the pooling requirements of the Closure Statutes had been preempted by the new federal "single risk pool" requirements. As to grandfathered plans, federal law also prohibited pooling them with non-grandfathered plans. Plaintiffs countered that their death spiral claims were not moot because grandfathered plans were still subject to improper rate increases. The motion was denied.

On March 4, 2014, Blue Shield filed its opposition to plaintiffs' motion for class certification. It argued that Martin and Goodwin were inadequate class representatives, and asserted plaintiffs had not proven common questions predominate over individualized issues of law and fact. It noted Goodwin was no longer a member of the class, and also argued Martin was an inadequate class representative because he was pursuing atypical claims. Blue Shield also raised evidentiary objections to two declarations submitted by plaintiffs.

In its opposition, Blue Shield included a declaration of expert witness Bruce Deal, an economist whose practice includes working on projects involving insurance matters, many of which utilize complex databases and detailed pricing and claims information. Deal opined that there would be no way to analyze economic damage incurred by plaintiffs without making individualized determinations for each class member. As to plaintiffs' claim that Blue Shield used a faulty pooling methodology, he noted "[t]he

preparation and calculation of rate actions are complex and involve many steps." He concluded: "Determining whether any individual class member suffered any harm from any of the challenged conduct by Blue Shield, however unlikely, would require very detailed individual inquiry and analysis." In a supplemental declaration executed on May 27, 2014, Deal estimated it would take *over 2,500 trained analysts working full-time for six months* to complete this analysis.

In their reply memorandum, plaintiffs challenged Deal's conclusions regarding the difficulties in computing restitution. They offered a declaration of Thomas Handley, their own expert, stating that calculating restitution could be done using the same automated methodology Blue Shield uses to calculate rates. According to Handley, completing such a calculation would take only two analysts or actuaries working for three months at most. Blue Shield moved to strike several paragraphs of Handley's declaration, asserting it contained new evidence that was improper on reply, went beyond rebuttal, and was in conflict with representations that plaintiffs had made to the court.

III. The Trial Court's Ruling

On April 2, 2015, the trial court denied plaintiffs' motion for certification. The court found, among other things, that Martin and Goodwin were not adequate class representatives on the declaratory relief claim because neither was a member of a closed plan subject to the allegedly improper pooling practices, and therefore neither had an ongoing dispute with Blue Shield. The court also concluded an injunctive relief class could not be certified because of inherent conflicts among class members, and because individual issues predominated regarding whether class members would want or be entitled to an injunction. Finally, the court found plaintiffs' claims for restitution were not appropriate for class certification because individual issues predominated over common ones.

On May 29, 2015, plaintiffs filed a notice of appeal of the order denying the motion for class certification.

On June 15, 2015, plaintiffs filed a motion to compel disclosure of names and contact information of putative class members. That same day, Blue Shield filed a motion to stay the proceedings pending appeal.

On July 10, 2015, the trial court filed its order granting Blue Shield's motion for a stay and denying plaintiff's motion to compel.

DISCUSSION

I. Governing Legal Principles and Standard of Review

"Section 382 of the Code of Civil Procedure authorizes class suits in California when 'the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.' " (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).) "In California it is settled that the class action proponent bears the burden of establishing the propriety of class certification." (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 922.)

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) " 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' " (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) That said, "issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." (*Linder, supra*, 23 Cal.4th at p. 443.)

"We review the trial court's ruling for abuse of discretion." (*Sav-On, supra,* 34 Cal.4th at p. 326.) "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. The denial of certification to an entire class is an appealable order [citations], but in the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].' [Citation.] Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal ' "even though there may be substantial evidence to support the court's order." ' [Citations.] Accordingly, we must examine the trial court's reasons for denying class certification." (*Linder, supra,* 23 Cal.4th at pp. 435–436.) As such, "appellate review of orders denying class certification differs from ordinary appellate review . . . [under which] we do not address the trial court's reasoning and consider only whether the result was correct." (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 939.) " 'Any valid pertinent reason stated will be sufficient to uphold the order.' " (*Linder,* at p. 436.)[5]

II. Unfair Competition Law

"Unfair competition" is defined by the UCL to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) The UCL's coverage is "sweeping, embracing ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1200.) "It governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major

[5] Plaintiffs argue that the standard of review is de novo because "the errors raised by [plaintiffs] involve the trial court's erroneous application of California law." They cite no authority for this proposition. Nor does the order implicate the incorrect application of any legal standards. The ruling simply involves the court's view on whether the evidence supports certification, a determination that was well within the court's discretion.

purpose 'the preservation of fair business competition.' " (*Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

The remedies available in a UCL action are limited to injunctive relief and restitution. "The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution. [Citation.] In order to recover under this measure, there must be evidence of the actual value of what the plaintiff received. When the plaintiff seeks to value the product received by means of the market price of another, comparable product, that measure cannot be awarded without evidence that the proposed comparator is actually a product of comparable value to what was received." (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 131; see also Bus. & Prof. Code, § 17203).

Plaintiffs allege that as a result of Blue Shield's unlawful business practices they and the putative class members paid illegally inflated premium rates in their closed plans. They seek monetary relief in the form of (1) refunds of the excess premiums they paid when enrolled in the closed plans; (2) refunds of the losses attributable to having to switch to other Blue Shield health plans, specifically in terms of differing deductibles and coinsurance obligations, and any associated disgorgement of profits; and (3) refunds due to the net financial losses attributable to having to leave Blue Shield altogether.

III. The Affordable Care Act

Before we proceed further, we note Blue Shield argues that the trial court's order should not be disturbed, as the premise of the lawsuit is no longer valid because the ACA became effective on January 1, 2014. As of that date, individuals may no longer be denied health coverage due to preexisting conditions, meaning that even an individual with a costly medical condition can leave his or her existing plan, obtain coverage under any open individual plan on the market, and pay a premium rate no higher than healthy individuals pay. (42 U.S.C. §§ 300gg-1, 300gg-4.) The ACA also requires a "single risk pool," in which risk is spread among all of the carrier's open plans. (42 U.S.C. § 18032(c)(1); 45 C.F.R. § 156.80(a); Health & Saf. Code, § 1399.849, subd. (h)(1); Ins. Code, § 10965.3, subd. (h)(1).) In light of the fact that the trial court denied Blue

Shield's motion for judgment on the pleadings (wherein Blue Shield raised similar arguments), we decline the invitation to rely on the ACA in affirming the court's decision on the certification motion.

IV. Whether Blue Shield Violated the Closure Statutes Statewide

As a threshold contention, Blue Shield Claims that even if plaintiffs' arguments on appeal have any merit, the trial court's ruling states alternate grounds for denial that they have not challenged. Blue Shield first contends plaintiffs could not have proved their basic claim that it violated the Closure Statutes classwide because a plan does not run afoul of the Closure Statutes unless it violates *both* of the two alternative ways to comply, namely, the transfer option and the pooling option. (See Health & Saf. Code, § 1367.15, subd. (c); Ins. Code, § 10176.10.)

In its denial order, the trial court noted (without expressly deciding) that class treatment of a claim under the transfer option in the Closure Statutes appeared to present serious problems, similar to those leading the court to deny certification of plaintiffs' claims under the Transfer Statutes—namely, that the inquiry would be unmanageable and predominately individual. The court made no ultimate determination with respect to the transfer option because plaintiffs contended that Blue Shield had "opted to pool," making the transfer option irrelevant.

We decline to address Blue Shield's specific argument here. As noted above, at the classification stage we do not generally address the merits of the case. Our Supreme Court summarized the governing principles as follows: "Presented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. " (*Brinker, supra*, 53 Cal.4th at p. 1025.) We are reminded that "[a] class certification motion is not a license for a free-floating inquiry into the validity of the complaint's

allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation]." (*Id*. at p. 1023.)

V. The Pooling Option

We reach a different conclusion with respect to Blue Shield's second threshold argument. Here, Blue Shield notes that in addition to ruling against plaintiffs with respect to their proposed remedies, the trial court found they had not satisfied their burden on the pooling option because they failed to provide any "admissible or reliable discussion" of how the court could determine whether or not Blue Shield had pooled the closed plans with "appropriate" open plans. In other words, plaintiffs had not satisfied their burden to show how the court could determine classwide liability under the pooling option. Because plaintiffs did not challenge this point in their opening brief, Blue Shield asserts any counterargument has been waived.

In their reply brief, plaintiffs claim this aspect of the trial court's order, like the transfer issue discussed above, "is a merits issue inappropriate for consideration at class certification." They also claim they "provided significant evidence that Blue Shield did not correctly pool the rates of the closed plans because it only used a limited number of open plans with small populations in their calculations, resulting in increased costs to class members, and made such calculations on a class-wide basis." They further contend that "[t]he fact the trial court did not resolve this question does not create an independent ground for denying class certification." But the lower court *did* resolve this question insofar as it is relevant to class certification. As noted, the court found plaintiffs had not offered *any* evidence relevant to whether the open plans Blue Shield used were, or were not, "appropriate" for pooling purposes.

The pages in the appellate record that plaintiffs cite for the proposition that they provided "significant evidence" to the trial court are underwhelming. In part, they rely on the declarations of two of plaintiffs' attorneys, to which most of Blue Shield's evidentiary objections were sustained, including the objection that the attorneys'

"unsubstantiated opinion that Plaintiffs can establish a uniform violation of the Closure Statutes and that Blue Shield's practices were illegal do not constitute substantial evidence, and are therefore irrelevant to the Court's inquiry." The court also sustained an objection to the effect that these declarations provided no evidentiary support for determining classwide fact of harm or calculating classwide relief. Plaintiffs do not acknowledge, much less challenge, these evidentiary rulings in their briefing. Accordingly, we agree plaintiffs failed to demonstrate the alleged violations of the pooling option can be proved on a classwide basis. However, we will proceed to address plaintiffs' remaining contentions.

VI. Adequacy of Named Plaintiffs as Representatives for Declaratory Relief

In addition to seeking restitution, plaintiffs sought to certify a class to obtain a declaration that Blue Shield violated the Closure Statutes by pooling unlawfully in order to improperly increase rates in closed plans. The trial court concluded Martin and Goodwin were inadequate class representatives for the TAC's declaratory relief claim because they were no longer enrolled in closed grandfathered health plans and thus "no longer had any dispute with Blue Shield concerning [their] statutory rights." We agree with Blue Shield that the court did not abuse its discretion in making this ruling.

Code of Civil Procedure section 1060 authorizes an action for declaratory relief. "[I]n cases of actual controversy relating to the legal rights and duties of the respective parties," any person may bring an action for a declaration of his or her rights and duties in connection with that controversy. (Code Civ. Proc., § 1060.) "The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (*Ibid.*)

"Declaratory relief is not available unless there is a real dispute between parties, 'involving justiciable questions relating to their rights and obligations.' [Citation.] 'The fundamental basis of declaratory relief is an actual, present controversy.' [Citation.] An actual controversy is 'one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, not suggest,

what the parties may or may not do.' " (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 638.) As the trial court properly noted, there is no longer an actual controversy between Martin or Goodwin and Blue Shield with respect to their rights under the grandfathered plans since they are no longer members.[6]

Plaintiffs cite several cases for the proposition that even where class members seek to obtain different forms of relief they may still be found to be adequate representatives. For example, in *Daniels v. Centennial Group, Inc.* (1993) 16 Cal.App.4th 467 (*Daniels*), the plaintiffs brought suit on behalf of a putative class of investors in six different partnerships.[7] The appellate court considered whether the class representatives could seek relief on behalf of the investors of one partnership in which the representatives had not invested. (*Id.* at pp. 470–471.) The court held the representatives were sufficiently similarly situated and shared a common interest in the same relief that was sought on behalf of the class. (*Id.* at p. 473.) Here, in contrast, the named plaintiffs do not have any interest in the relief that they purport to seek on behalf of the class.

Finally, plaintiffs argue that they can adequately represent the class because if the alleged wrongful practice is ceased, they would like to return to the closed plans they left. This point is mere speculation, assuming such transfer is even possible under the ACA (see 42 U.S.C. § 18011, subds. (b), (c) [enrollment limitations for grandfathered plans].)

VII. Injunctive Relief Claims

In the TAC, plaintiffs sought an injunction "enjoining Blue Shield from actual, threatened, continuing and/or imminent violations" of the Closure Statutes and the UCL. Subsequently, they suggested they might request a variety of injunctive relief on behalf of

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[6] Plaintiffs complain that they left their plans because of "excessive premium rate increases," and that it is unfair to require representatives to endure an "illegal . . . practice[]" in order to seek relief. We note there is no guarantee that every perceived wrong will be suitable for class action treatment, which is why plaintiffs are required to file motions for certification in the first place.

[7] The other cases plaintiffs cite to do not involve class actions (e.g., *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1072), or concern claims for injunctive relief (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1020–1021).

the class. The trial court denied certification of the claims for injunctive relief for two reasons. First, the court found that individual issues predominated on the question of whether all class members would actually want the relief being sought. Second, the class members had an inherent conflict as to the requested relief because a decrease in rates for some class members would result in an increase in rates for others. We find the court did not abuse its discretion in making these findings.

"In order to be deemed an adequate class representative, the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class. This is part of the community of interest requirement. [Citation.] Where there is a conflict that goes to the ' "very subject matter of the litigation," ' it will defeat a party's claim of class representative status. [Citation.] Thus, a finding of adequate representation will not be appropriate if the proposed class representative's interests are antagonistic to the remainder of the class. [Citation.] 'The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent.' " (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 851.)

The trial court noted that while Martin stated he hoped to be returned to his properly pooled closed plan, other members might not desire this exact same result. Also, the court observed other members might seek to exclude class members such as Martin, whose experience might force rates up, from their own new pools. Thus, the court found the request relief "exposes the inherent conflicts among the various parts of the class." Plaintiffs do not offer a persuasive counterargument. Instead, they dismiss the court's conclusions as merely "theoretical." They also assert the court "committed legal error" in concluding the putative class members had irreconcilable conflicts, relying, in part, on *Daniels, supra*, 16 Cal.App.4th 467.

In *Daniels*, the trial court had denied class certification, in part, because of " 'the apparent conflict caused by the prayer for rescission.' " (*Daniels, supra*, 16 Cal.App.4th at p. 471.) In their complaint, the plaintiffs had sought money damages for fraud or, in the alternative, rescission of the underlying transaction. (*Ibid.*) The appellate court noted

there was no evidence contradicting the plaintiffs' assertion that the rescission claim was likely to go away on its own because damages was a more lucrative remedy, and concluded that even if a conflict existed, the remedy was to certify a damages class and not dismiss the entire action. (*Id*. at p. 472.)

In the present case, we cannot fault the trial court for concluding that the relief sought by the injunctive relief claim created an inherent conflict between members of the putative class. As the court observed: "Members of a class defined as those whose experience drive their rates up absent re-pooling (and that's what this purported class is) all have an interest in ensuring *no other class member* gets the same relief." Rather than finding the court "committed legal error by applying the wrong standard," we find the court's logic to be inescapable.[8] Further, its conclusions are supported by Deal's declaration.

VIII. Plaintiffs' Methodology for Establishing Restitution

Plaintiffs contend the trial court erred in rejecting their proposed methodology for establishing monetary relief on a classwide basis. This argument fails for the reasons stated above regarding the failure to present any evidence of improper pooling. For example, they again rely on portions of their attorneys' declarations that the trial court struck. They also rely on Handley's theory, which the court also excluded, that restitution could be determined by recalculating closed plan premium rates using the same automated methodology Blue Shield used to calculate premium rates in the first place. Even after considering Handley's methodology, the trial court found plaintiffs

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[8] Plaintiffs' alternative argument that Blue Shield "could cover any restitution owed as a result of appropriate pooling by tapping their copious premium-funded excess reserves" is problematic. It is highly unlikely that *all* of Blue Shield's reserves were accumulated as the result of improper pooling. As Blue Shield notes, nonrestitutionary disgorgement is not an available remedy under the UCL. (See *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 800.) Additionally, the federal cases plaintiffs cite concerning fraudulent misrepresentations of a company's stock prices are inapposite in that the alleged conflicts related to the type of relief sought and were not inherent in the plaintiffs' claims themselves.

would not be able to prove their theory of relief using classwide proof, crediting Deal's declaration instead. We cannot say that the trial court abused its discretion.

The trial court observed Handley did not explain why his " 'actuarial' " method is a reasonable approach, and concluded his statement that it is essentially the same method as used by Blue Shield was "probably wrong." Specifically, Handley had said he would apply Blue Shield's own rating factors to calculate individual damages after computing the modified base rate using his methodology. However, other evidence showed that Blue Shield's individual rates are the product of a number of factors that may apply differently to each individual. Handley's methodology was inconsistent with Blue Shield's methodology, "in that Handley appears to be computing a base rate that will then be modified by certain factors" whereas "Blue Shield never calculates a base rate but sets its initial rate based on a confluence of factors." As an appellate court we will generally defer to a trial court's determination when it comes to its perceived ability to manage issues raised in the context of a proposed class action suit. Plaintiffs have not persuaded us that we need to depart from this deferential standard here.

IX. Plaintiffs' Proposed Categories of Restitution

In their reply brief filed in conjunction with their certification motion, plaintiffs for the first time set forth a restitution theory. The theory has three categories, all based on Handley's declarations: (1) individuals in closed plans who paid rates that were the result of illegal pooling would be entitled to restitution of the difference between the rate paid and a recalculated rate using proper pooling; (2) individuals forced to transfer to another Blue Shield plan would be entitled to restitution of their higher out-of-pocket costs as a result of being forced into noncomparable coverage; and (3) individuals that left Blue Shield would be entitled to restitution reflecting the out-of-pocket costs incurred as a result of being forced into noncomparable coverage.

The trial court found each of these categories would raise unmanageable issues. As to the first category, the court credited Blue Shield's expert evidence to the effect that "to recalculate a single plaintiff[']s] rates based on a revised pool, there will have to be a recalculation of a host of factors." The court concluded this category raised

predominately individual issues. With as many as 51 plans at stake, plaintiffs had not shown how to calculate the amount of harm for each class member. Plaintiffs now raise several arguments challenging the court's decision, yet they do not address the fundamental issue of whether Handley's proposed method of recalculating rates is consistent with Blue Shield's approach (described above) in setting these rates, such that Handley would be able to perform the simple recalculation he proposed.

As to the second category, the trial court found Handley's methodology assumed individuals transferred out of their closed plan because of Blue Shield's conduct. The court reasonably concluded class members may have chosen to transfer to the new plan for reasons other than premium rate increases. The court also appeared to question, again, Handley's proposed methodology. Plaintiffs do not provide us with persuasive legal authority suggesting error in the court's conclusion that individual issues pertaining to this alleged harm are unmanageable.

Finally, as to the third category of restitution, the trial court found Handley's statistical sampling method for determining out-of-pocket costs would create unmanageable individual issues. Also, the court noted that under *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148–1150, it was unlikely class members would have any entitlement to health care costs they paid when they were not insured by Blue Shield. This is because restitution under the UCL allows a plaintiff to recover money or property from the defendant in which the plaintiff has a vested interest, such as money obtained from the plaintiff through unfair practice or unpaid wages. Plaintiffs do not explain how the UCL entitles them to money paid to insurers other than Blue Shield.

X. Failure to Certify Liability on a Classwide Basis

Finally, plaintiffs argue the trial court erred in declining to certify a liability-only class under California Rules of Court, rule 3.765(b) ["When appropriate, an action may be maintained as a class action limited to particular issues. A class may be divided into subclasses."] It does not appear the court specifically ruled on their request, which was buried in a supplemental motion for class certification. In light of the all the defects we

have already discussed, some of which do pertain to liability, we cannot say plaintiffs suffered any prejudice in the court's failure to certify a liability-only class.[9]

DISPOSITION

The order denying plaintiffs' motion for class certification is affirmed.

[9] Plaintiffs ask us to direct the trial court to allow "*Pioneer*" notices to be disseminated if we conclude they are not adequate class representatives and order Blue Shield to disclose the contact information of potential class members. (See *Pioneer Electronics* (*USA*), *Inc. v. Superior Court* (2007) 40 Cal.4th 360.) The court denied the order on the grounds that the issue was moot because the court had granted Blue Shield's motion to stay the class proceedings pending this appeal. We find no abuse of discretion in the denial.

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DONDERO, J.

We concur:

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MARGULIES, Acting P. J.

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BANKE, J.

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